Supreme Court, U.S.
FILED
AUG 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-103

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIE BIGFORD, JR.
PETITIONER

V.

JOE MAX TAYLOR, ET AL,
RESPONDENTS

SUPPLEMENTARY BRIEF FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BEATRICE MLADENKA-FOWLER
NELSON, LOCKE & FOWLER
3303 Main St., Ste. 300
Houston, TX 77002-9392
(713) 526-1998

J. PATRICK WISEMAN
RICHARDS, WISEMAN & DURST
600 W. 7th Street
Austin, Texas 78701
(512) 479-5017

Attorneys for
Willie Bigford, Jr.

NO. 88-103

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIE BIGFORD, JR.
PETITIONER

V.

JOE MAX TAYLOR, ET AL,
RESPONDENTS

SUPPLEMENTARY BRIEF FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BEATRICE MLADENKA-FOWLER
NELSON, LOCKE & FOWLER
3303 Main St., Ste. 300
Houston, TX 77002-9392
(713) 526-1998

J. PATRICK WISEMAN
RICHARDS, WISEMAN & DURST
600 W. 7th Street
Austin, Texas 78701
(512) 479-5017

Attorneys for
Willie Bigford, Jr.

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATUTORY PROVISIONS INVOLVED.....	2
SUPPLEMENTARY ARGUMENT FOR GRANTING THE WRIT OF CERTIORARI.	2
SUGGESTION FOR DISPOSITION.....	6
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	8

TABLE OF AUTHORITIES

Cases

Baker v. Wade, 769 F.2d 289 (5th Cir. 1985)..... 4

Bigford v. Taylor, 834 F.2d 1213 (5th Cir. 1988)..... 2,3,6

Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980).... 3

Nash v. Chandler, Slip op. No. 86-2327, 87-2485 (5th Cir. June 30, 1988)..... 1,3,4,5,6

Statutes

28 U.S.C. 2403(b)..... 2,1,5

Tex. Pen. Code Ann. § 21.06..... 4

NO. 88-103

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIE BIGFORD, JR.
PETITIONER

V.

JOE MAX TAYLOR, ET AL,
RESPONDENTS

SUPPLEMENTARY BRIEF FOR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT:

The Appellant, Willie Bigford, Jr., respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 5, 1988, with Petitioner's timely Motion for Rehearing denied on March 10, 1988.

STATUTORY PROVISIONS INVOLVED

28 U.S.C § 2403(b) states in pertinent part:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence...and for argument on the question of constitutionality.

SUPPLEMENTARY ARGUMENT FOR WRIT OF CERTIORARI

In *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir. 1988), the panel,[1] J. Rubin writing for the Court, refused to reach the merits of Bigford's due process claim, stating that "none of those who are made defendants to this claim may be

1. The Bigford panel was comprised of J. Clark, J. Gee, and J. Rubin.

held liable." *Id.* at 1221. Relying upon its earlier decision in *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980) the court found that Galveston County could not be held liable for effectuation of a state policy. *Bigford, supra*, at 1223, *citing* to *Familias Unidas, supra*, at 619 F.2d 404.

The court refused to rule on the facial constitutionality of the statute challenged by Appellant because the State of Texas was not a party to the action. Nevertheless, just six months later, another panel of the Fifth Circuit,[2] J. Brown writing for the court, established in *Nash v. Chandler*, Slip Op. Nos. 86-2327 and 87-2485 (5th Cir. June 30, 1988) that the state is

---

2. J. Rubin was also on the *Nash* panel with J. Brown and J. Higginbotham.

not a necessary party for a ruling on the constitutionality of a statute.

Prior to the *Nash* ruling, the status of the law was unclear as to whether the State was a necessary party for purposes of ruling on the constitutionality of a state statute. In *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985), *cert denied* 106 S.Ct. 3337 (1986), the district attorney of Potter County was granted standing to prosecute an appeal of a declaratory judgment holding Tex. Pen. Code Ann. § 21.06 (Vernon's 1974) unconstitutional. In that case, the Court en banc held that District Attorney Hill "was a member of the class, was enjoined by that judgment, and as district attorney was a proper official under Texas law to represent the state." *Id.* at p. 291.[3]

3. Similarly, in this case the district court ordered that the

Thus, it remained unclear as to whether the state was a necessary party to the litigation, given Hill's status as a member of the injured class.

In *Nash, supra*, however, there were no state officials involved in the merits of the case. The State of Texas was present in the litigation only as mandated by 28 U.S.C. 2403(b) (*Id.* at p. 4132-33). Because the plaintiffs in *Nash* had prevailed on the merits, and the district court had awarded attorneys fees against the defendants, including the State of Texas, jointly and severally, this court remanded for a determination of the State's liability

---

Sheriff of Galveston County was a proper state official to represent the State of Texas in response to Bigford's challenge to the constitutionality of the statute offered by the County and his motion for intervention by the State. This issue has been previously raised in this Petition.

for attorneys' fees "...in accordance with the amount of time which was expended by the plaintiffs as a result of the State's intervention." *Id.*

As in *Bigford*, the litigation in *Nash* involved an attack on the facial constitutionality of a statute. Even though no state officials were involved in the constitutional tort alleged by the plaintiffs in *Nash*, the court nevertheless ruled on the constitutionality of the challenged statute, in conflict with its position in *Bigford* just six months earlier.

SUGGESTION FOR DISPOSITION

Appellant respectfully requests the Court to grant petition for certiorari in this case.

In the alternative, Appellant respectfully suggests that an appropriate disposition of this matter

may be to remand to the Fifth Circuit for rehearing *en banc* for resolution of the conflict existing within the Circuit.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit. In the alternative, Appellant respectfully suggests remand to the Fifth Circuit for rehearing en banc to resolve the conflict within the Circuit.

Respectfully submitted,

BEATRICE MLADENKA-FOWLER
NELSON, LOCKE & FOWLER
3303 Main St., Ste. 300
Houston, TX 77002-9392
(713) 526-1998

J. PATRICK WISEMAN
RICHARDS, WISEMAN & DURST
600 W. 7th Street
Austin, Texas 78701
(512) 479-5017

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Beatrice Mladenka-Fowler, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon Respondents by depositing same in the United States Mail, certified, return receipt requested, to the following attorney of record for Respondents: Mr. Scott Lyford, Galveston County Legal Dept., 4127 Shearn Moody Plaza, 25th & Strand St., Galveston, Texas 77550, on this the _____ day of _____, 1988.

BEATRICE MLADENKA-FOWLER